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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. [redacted]69

BERNARD M. SHOTKIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF TO RESPONDENT IN PETITION FOR WRIT OF CERTIORARI.

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THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

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REPLY BRIEF TO RESPONDENT IN PETITION FOR WRIT OF CERTIORARI.

Rulings of Contempt by This Court.

This Court recently granted certiorari and considered a state case in which constitutional rights under the Fourteenth Amendment were only slightly involved as compared with the present case. *Fisher* v. *Pace,* 336 U. S. 155. There is in the present case no charge of contempt in open court, and petitioner's limitation to filed motions and petitions presents a record showing that there was no such contempt. In *Cooke* v. *United States,* 267 U. S. 517 (1925), 536, 537, this Court said that when contempt is not in open court

there is "opportunity of the accused to present his defense by witnesses and argument." This Court further said:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

The present case involves a refusal of due process protection beyond that required in the *Cooke* case by this Court.

The Issues of the Case.

This case was initiated in the Supreme Court of Colorado on the ground of alleged contempt through petitioner's appearances in the trial court without counsel (Rec. 2-6). The appearances related to a state sales tax, and in one of them petitioner was able to act through an attorney (Rec. 57). As previously indicated, the transaction subjected to taxation was one beyond the state, but payment was made by petitioner in order to avoid a complete destruction of his business by the Director of Revenue of the State of Colorado.

The trial court to which the petitioner first presented the matter expressed the opinion that he was really a defendant, and that the opinion of the Supreme Court as to appearance without counsel did not apply (Rec. 60). The trial court had the authority and duty to pass upon such an issue, and the respondent has cautiously avoided any reference to this matter. Although the trial court had a duty to act, petitioner is subjected to a criminal penalty

by the Supreme Court of Colorado for an action approved by the trial court.

While avoiding any reference to the trial court's statement (Rec. 60), respondent bases its position largely upon an unreported opinion not in the record which had no relation to the issue of the Fourteenth Amendment. This Court has before it not only the question above indicated, but also the question as to whether due process of law was employed by the Supreme Court of Colorado in its contempt proceeding.

The Procedure of the Case.

Respondent claims that petitioner had ample opportunity "to present his defenses and to have his day in court" (Respondent's Brief, 12-13), and that he relied upon improper motions and petitions (Respondent's Brief, 4-5). That he had opportunity is claimed upon the fact that the court gave him ten (10) days notice to reply to charges of contempt presented by the Attorney General of Colorado (Rec. 6). Had this been a full authority it would have permitted counsel, witnesses and oral argument.

Applications by petitioner for witnesses and possible oral argument were denied by the Supreme Court of Colorado (Rec. 10, 16, 25).

Although Respondent's Brief (pp. 4-5) lists the motions and petitions presented by petitioner, it in no way refers to the fact that three successive motions were made asking the Court to appoint an attorney to represent petitioner (Rec. 7, 8, 30, 33, 61, 62). The Court was informed that he had been unable to procure counsel, and was asked to appoint an attorney at a reasonable fee. In the third of these motions a check of $100 was filed with a statement of willingness to pay such additional fee as the Court might determine (Rec. 61).

Summary of Matters at Issue.

Each of the three motions for appointment of counsel was denied (Rec. 8, 33, 62). Not only did the Supreme Court of Colorado deny hearing and counsel, but, taking the position that it is contempt for a person to appear in court without counsel, it denies a right of counsel in the Supreme Court to a person prosecuted for contempt in that he acted without counsel before the trial court.

In addition, it must be understood that (1) the alleged contempt was before a trial court; (2) it was the duty of the trial court to construe the principle established by the Supreme Court; (3) the trial court construed the transaction here involved as not controlled by the decision of *Shotkin* v. *Kaplan,* 116 Colo. 295, by the State Supreme Court; and (5) the State Supreme Court punishes as contempt a proceeding construed by the trial court not to require counsel.

Further attention may be brought to the fact that the penalty here involved is one of serious and continuous injury to the petitioner and to his business.

Federal Issues.

With reference to due process of law under the Fourteenth Amendment it is fully established that a penal statute must be explicit. The same rule should apply to a judicial action which creates a criminal offense. A rule so established is not explicit if drawn in such a manner as to be construed differently by its author and by those operating under it. Such is the case in this proceeding. This matter involves a federal question and is discussed in petitioner's brief, pp. 13-14, but not referred to by the respondent.

Petitioner was in this case deprived of counsel, the use of witnesses, and of oral argument (Rec. 10, 16, 25). Respondent contends that rules of criminal proceeding do not apply to criminal contempt, but this is not in full agreement with statements by this Court (Petitioner's Brief, pp. 12-13). *Uveges* v. *Pennsylvania,* 335 U. S. 447, indicates a principle, and respondent's quotation of the annotation of that case in 93 Law Ed. 137, 138, is correct in saying that, with reference to counsel, the Sixth Amendment establishes a broader rule for federal courts than the Fourteenth Amendment does for state courts (Respondent's Brief, pp. 11-12). But the Fourteenth Amendment is a protection and presents a federal question in such protection. And such protection is within the terms of that amendment when a state court may defeat justice by the violation of the very principle which it also purports to be enforcing, and by denying an opportunity to be heard and to call witnesses.

Respectfully submitted,

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